

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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JAMES RIVER INSURANCE COMPANY,

Case No. 2:11-cv-01879-MMD-PAL

Plaintiff,

ORDER

v.

(Plf.'s Motion to Dismiss Ace Cab's  
Counterclaim – dkt. no. 11)

ACE CAB, INC. aka ACE CAB COMPANY;  
DEREJE GUALE; JON VINCE; and  
LINCOLN GENERAL INSURANCE  
COMPANY,

Defendants.

**I. SUMMARY**

Before the Court is Plaintiff/Counterdefendant James River Insurance Company's Motion to Dismiss. (Dkt. no. 11.) For reasons discussed below, the Motion is denied.

**II. BACKGROUND**

This case is an insurance dispute arising from an automobile accident, which occurred on February 3, 2007. Defendant Dereje Guale ("Guale") was employed by Defendant Ace Cab, Inc. ("Ace") when the cab he was driving collided with another vehicle driven by Jon Vince ("Vince"). Ace's fleet of vehicles was covered by an insurance policy with Defendant Lincoln General Insurance Company, which provided \$1,000,000 in liability coverage. In addition, Ace had a secondary insurance policy (the "Policy") with Plaintiff James River Insurance Company ("James River"), which provided \$4,000,000 additional coverage on claims for liability in excess of \$1,000,000. Vince

1 brought suit (the “Underlying Action”) against all parties to the instant action. The  
2 Underlying Action was settled for more than \$1,000,000.

3 James River brought this action on November 21, 2011, to recover an amount it  
4 allegedly paid out on the claims, but was not obligated to pay based on Ace’s non-  
5 compliance with the Policy. Ace counterclaimed for breach of contract, breach of the  
6 implied covenant of good faith and fair dealing, and violation of Nevada’s Unfair Trade  
7 Practices Act, alleging that it was in full compliance with the terms of the contract and  
8 that James River failed to investigate, defend, evaluate, and ultimately, pay the claim as  
9 obligated. James River now seeks dismissal of the Counterclaim.

### 10 **III. DISCUSSION**

11 The standard on a motion to dismiss a counterclaim under Fed. R. Civ. P.  
12 12(b)(6) is the same as on a motion to dismiss a plaintiff’s complaint. To survive a  
13 motion to dismiss, a counterclaim must contain sufficient factual matter, accepted as  
14 true, to state a claim for relief that is plausible on its face. *E.g., Bell Atl. Corp. v.*  
15 *Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The  
16 factual matter must be “more than labels and conclusions” or a “formulaic recitation of  
17 the elements of a cause of action.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*,  
18 478 U.S. 265, 286 (1986)). Dismissal is proper where a counterclaim does not permit  
19 the court to infer more than the mere possibility of misconduct and the complaint has  
20 simply “alleged—but not shown—that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at  
21 679. Contrarily, a claim survives a motion to dismiss when the counterclaim alleges  
22 facts that allow the court to draw a reasonable inference that the defendant is liable for  
23 the alleged misconduct. *Id.* at 678.

24 James River asserts that the breach of contract, insurance bad faith, and Nevada  
25 Unfair Trade Practices Act claims in Ace’s Counterclaim do not state a claim upon which  
26 relief can be granted because 1) Ace did not comply with the notification terms of the  
27 policy and thus, James River was not obligated to pay, 2) James River was not obligated  
28 to pay until the settlement with Vince and the primary insurance limit was exhausted, and

1 3) James River actually paid out on the policy. James River argues that these  
2 assertions constitute legal deficiencies with which the Counterclaim cannot survive.

3 However, James River misconstrues the 12(b)(6) standard. Ace's Counterclaim  
4 alleges that it was, at all times, in full compliance with the terms of the policy, including  
5 the notification provisions, and that upon notification, James River failed to conduct a  
6 reasonable investigation, evaluate the claim, defend against the claim, and ultimately,  
7 pay the claim. On a motion to dismiss, the Court must presume the facts stated in the  
8 Counterclaim are true and these alleged facts are sufficient to sustain the breach of  
9 contract, insurance bad faith, and Nevada Unfair Trade Practices claims. James River's  
10 Motion simply presents its own version of the facts and demonstrates that a factual  
11 dispute exists between the parties. Evidence will determine whose version is correct;  
12 however, on a motion to dismiss, this inquiry is premature.

13 Additionally, the documents attached to James River's Motion do not resolve the  
14 factual dispute. James River asserts that the Court may properly consider the Policy  
15 itself and may take judicial notice of the settlement agreement from the Underlying  
16 Action. James River further asserts that those documents contradict Ace's factual  
17 account presented in the Counterclaim and argues that, consequently, the Counterclaim  
18 is not plausible and should be dismissed. The Court disagrees.

19 "Documents whose contents are alleged in a complaint and whose authenticity  
20 no party questions, but which are not physically attached to the pleading, may be  
21 considered in ruling on a Rule 12(b)(6) motion to dismiss." *In re Silicon Graphics Inc.*  
22 *Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 2002) (quoting *Branch v. Tunnell*, 14 F.3d 449,  
23 454 (9th Cir. 1994)). James River properly notes that the Court may examine the  
24 insurance policy as Ace relies on this policy in their Counterclaim and does not challenge  
25 the authenticity of James River's proffered document. However, the dispute is not about  
26 what the contract requires, but rather, if Ace complied. Both parties have alleged a  
27 different set of facts regarding Ace's compliance. The insurance policy does not resolve  
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1 this factual dispute. The Court must accept the facts alleged in the Counterclaim as true,  
2 and thus, dismissal is improper.


3 Further, although a court may take judicial notice of documents in the public  
4 record, *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986), the  
5 settlement agreement attached to James River's motion does not give any indication that  
6 it exists within the public record. Rather, the document appears to be a private  
7 contractual release of claims between the parties. As such, this is not the kind of fact  
8 that may be judicially noticed. The Court also notes that even if the document were  
9 proper for the Court's consideration, the substance of the document is not proof of  
10 payment, but simply that James River had agreed to pay. This is consistent with Ace's  
11 set of facts in which James River was obligated to pay and refused to do so.

12 Ace's Counterclaim alleges facts that allow the Court to draw a reasonable  
13 inference that James River is liable for the alleged misconduct. Consequently, the  
14 Motion to Dismiss is denied.

15 **III. CONCLUSION**

16 IT IS THEREFORE ORDERED that Plaintiff/Counterdefendant James River's  
17 Motion to Dismiss Ace Cab's Counterclaim is DENIED.

18 DATED THIS 31<sup>st</sup> day of October 2012.

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23 MIRANDA M. DU  
24 UNITED STATES DISTRICT JUDGE  
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